

AO 242 (Rev. 09/17) Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241

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JUL - 9 2018	
CLERK U S DISTRICT COURT DISTRICT OF ARIZONA	
BY _____	DEPUTY

UNITED STATES DISTRICT COURT  
for the  
District of Arizona

Troy Gross SR  
*Petitioner*

v.  
Warden, Rhodes

United States Penitentiary, Tucson  
*Respondent*  
(name of warden or authorized person having custody of petitioner)

CV 18-0339 TUC JGZ BPV

Case No.

(Supplied by Clerk of Court)

**PETITION FOR A WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2241**

**Personal Information**

1. (a) Your full name: Troy Aaron Gross, SR.
1. (b) Other names you have used: \_\_\_\_\_
2. Place of confinement:
  - (a) Name of institution: United States Penitentiary, Tucson
  - (b) Address: P.O. Box # 24550  
Tucson, AZ 85734
  - (c) Your identification number: 42254-037
3. Are you currently being held on orders by:
 

Federal authorities     State authorities     Other - explain:
4. Are you currently:
 

A pretrial detainee (waiting for trial on criminal charges)  
 Serving a sentence (incarceration, parole, probation, etc.) after having been convicted of a crime

If you are currently serving a sentence, provide:

  - (a) Name and location of court that sentenced you: U.S. Courthouse, 101 W.  
Lombard Street, Baltimore, MD. 21201
  - (b) Docket number of criminal case: 4655974 - 07-4939
  - (c) Date of sentencing: September 28, 2007

Being held on an immigration charge  
 Other (explain): Criminal conviction and sentencing

**Decision or Action You Are Challenging**

5. What are you challenging in this petition:
 

How your sentence is being carried out, calculated, or credited by prison or parole authorities (for example, revocation or calculation of good time credits)

- Pretrial detention  
 Immigration detention  
 Detainer  
 The validity of your conviction or sentence as imposed (for example, sentence beyond the statutory maximum or improperly calculated under the sentencing guidelines)  
 Disciplinary proceedings  
 Other (explain): Actual Innocence

## 6. Provide more information about the decision or action you are challenging:

(a) Name and location of the agency or court: United States District Court for the District of Maryland, Baltimore

(b) Docket number, case number, or opinion number: RDB-07-0132

(c) Decision or action you are challenging (for disciplinary proceedings, specify the penalties imposed):

I AM challenging the Decision of the Fourth circuit court of Appeals that affirmed my conviction and sentence.

As I am actually and factually innocent of alleged crime due to "Double Jeopardy"

(d) Date of the decision or action: September 18, 2008

**Your Earlier Challenges of the Decision or Action**7. **First appeal**

Did you appeal the decision, file a grievance, or seek an administrative remedy?

Yes

No

## (a) If "Yes," provide:

(1) Name of the authority, agency, or court: U.S. Court of Appeals for the fourth Circuit

(2) Date of filing: May 28, 2008

(3) Docket number, case number, or opinion number: 07-4939

(4) Result: Affirmed

(5) Date of result: Submitted: September 16, 2008. Decided: Sept. 18, 2008

(6) Issues raised: Whether the trial court erred and abused its discretion in denying the motion to withdraw the plea of guilty by the appellant?

## (b) If you answered "No," explain why you did not appeal:

AO 242 (Rev. 09/17) Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241

(a) If "Yes," provide:

(1) Name of the authority, agency, or court: \_\_\_\_\_

(2) Date of filing: \_\_\_\_\_

(3) Docket number, case number, or opinion number: \_\_\_\_\_

(4) Result: \_\_\_\_\_

(5) Date of result: \_\_\_\_\_

(6) Issues raised: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(b) If you answered "No," explain why you did not file a second appeal: N/A

9.

**Third appeal**

After the second appeal, did you file a third appeal to a higher authority, agency, or court?

Yes       No

(a) If "Yes," provide:

(1) Name of the authority, agency, or court: \_\_\_\_\_

(2) Date of filing: \_\_\_\_\_

(3) Docket number, case number, or opinion number: \_\_\_\_\_

(4) Result: \_\_\_\_\_

(5) Date of result: \_\_\_\_\_

(6) Issues raised: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(b) If you answered "No," explain why you did not file a third appeal: N/A

10.

**Motion under 28 U.S.C. § 2255**

In this petition, are you challenging the validity of your conviction or sentence as imposed?

Yes       No

If "Yes," answer the following:

(a) Have you already filed a motion under 28 U.S.C. § 2255 that challenged this conviction or sentence?

Yes       No

If "Yes," provide:

- (1) Name of court: U.S. District court For The District of Maryland
  - (2) Case number: RDB-07-0132
  - (3) Date of filing: January 22, 2010
  - (4) Result: withdrawn based on advice of counsel Denied
  - (5) Date of result: 07/29/10
  - (6) Issues raised: Trial court error in failing to allow petitioner to withdraw guilty plea
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- (b) Have you ever filed a motion in a United States Court of Appeals under 28 U.S.C. § 2244(b)(3)(A), seeking permission to file a second or successive Section 2255 motion to challenge this conviction or sentence?

Yes       No

If "Yes," provide:

- (1) Name of court: U.S. Court of Appeals For The Fourth circuit
  - (2) Case number: RDB-07-0132
  - (3) Date of filing: May 23, 2016
  - (4) Result: Granted / withdrawn on advice of counsel
  - (5) Date of result: Granted: June 21, 2016. withdrawn: February 23, 2018
  - (6) Issues raised: whether petitioner was a career offender  
pursuant to Johnson v. U.S.
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- (c) Explain why the remedy under 28 U.S.C. § 2255 is inadequate or ineffective to challenge your conviction or sentence: The claim of actual innocence was not available to me, as McQuiggans v. Perkins (S.C.T.) was unavailable in my initial 2255, so I have not had an unobstructed procedural shot as to this issue, as per Bousley,
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#### 11. Appeals of immigration proceedings

Does this case concern immigration proceedings?

Yes       No

If "Yes," provide:

- (a) Date you were taken into immigration custody: \_\_\_\_\_
- (b) Date of the removal or reinstatement order: \_\_\_\_\_
- (c) Did you file an appeal with the Board of Immigration Appeals? \_\_\_\_\_

Yes       No

If "Yes," provide:

- (1) Date of filing: \_\_\_\_\_
- (2) Case number: \_\_\_\_\_
- (3) Result: \_\_\_\_\_
- (4) Date of result: \_\_\_\_\_
- (5) Issues raised: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(d) Did you appeal the decision to the United States Court of Appeals?

Yes  No

If "Yes," provide:

- (1) Name of court: \_\_\_\_\_
- (2) Date of filing: \_\_\_\_\_
- (3) Case number: \_\_\_\_\_
- (4) Result: \_\_\_\_\_
- (5) Date of result: \_\_\_\_\_
- (6) Issues raised: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

## 12. Other appeals

Other than the appeals you listed above, have you filed any other petition, application, or motion about the issues raised in this petition?

Yes  No

If "Yes," provide:

- (a) Kind of petition, motion, or application: \_\_\_\_\_
- (b) Name of the authority, agency, or court: \_\_\_\_\_
  
- (c) Date of filing: \_\_\_\_\_
- (d) Docket number, case number, or opinion number: \_\_\_\_\_
- (e) Result: \_\_\_\_\_
- (f) Date of result: \_\_\_\_\_
- (g) Issues raised: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Grounds for Your Challenge in This Petition**

13. State every ground (reason) that supports your claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. Any legal arguments must be submitted in a separate memorandum.

**GROUND ONE:** Actual and Factual Innocence- violation of Substantial Rights

(a) Supporting facts (Be brief. Do not cite cases or law.):

On September 18, 2008 the Fourth Circuit Court of Appeals in case No. 07-4939, affirmed Petitioner's conviction of a violation of 18 USC 2113(a), (d), and (f) Count one; a violation of 18 USC 924(c) in counts Two and Five. Petitioner received 262 months for count one, with 84 months consecutive for count two; (see continuation attached)

(b) Did you present Ground One in all appeals that were available to you?

Yes       No

**GROUND TWO:** N/A

(a) Supporting facts (Be brief. Do not cite cases or law.):

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(b) Did you present Ground Two in all appeals that were available to you?

Yes       No

**GROUND THREE:** N/A

(a) Supporting facts (Be brief. Do not cite cases or law.):

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(b) Did you present Ground Three in all appeals that were available to you?

Yes       No

## Ground One: Actual and Factual Innocence- violation of substantial Rights.

Facts: On September 18, 2008 the Fourth Circuit Court of Appeals in Case No. 07-4939, affirmed Petitioner's conviction of a violation of 18 USC 2113(a),(d), and (F) Count one; a violation of 18 USC 924(c) in Counts Two and Five. Petitioner received 262 months for Count one, with 84 months consecutive for Count Two, and 300 months consecutive for Count Five for a sum total of 646 months.

Petitioner avers that he is actually and factually innocent of the 262 month sentence in count one, under his initial plea agreement, due to a violation of Petitioner's substantial rights. He has not had an unobstructed procedural shot, or used this on his initial appeal or first 2255.

Petitioner avers Two (2) constitutional violations of his substantial rights proves out that his convictions and sentence as to Count One-18 USC 2113(a),(d), and (F) was illegally obtained in the following ways to wit:

1). Petitioner cannot knowingly and intelligently plead guilty to a charge of Double Jeopardy, which he did in Count one.

Count one alleges a violation of 18 USC 2113(a),(d), and (F), which is where the Double Jeopardy immediately attaches because 18 USC 2113(a) carries a statutory Term specific of maximum of 20 years, while 18 USC 2113(d) carries a statutory Term specific of a maximum of 25 years.

Ground One (Cont).

This makes 18 USC 2113(a) the lesser included offense of 18 USC 2113(d), and it meets the Biltzburger test in determining a lesser included offense.

In as much that 18 USC 2113(a) is the lesser included offense of 18 USC 2113(d), then Petitioner cannot be guilty of a violation of 18 USC 2113(a),(d) for that is Double Jeopardy. Petitioner can only be found guilty of a violation of 18 USC 2113(a), or 18 USC 2113(d), not both, due to Biltzburger and its progeny, which is law of the land.

2). Due to the fact that Petitioner conviction for a violation of 18 USC 2113(a),(d) cannot stand, due to the violation of Petitioner's substantial rights, then there is no "crime of violence" to uphold the 18 USC 924(c) conviction in Count Two, for to allege a violation of the count Two 18 USC 924(c), which relied on the "crime of violence" in Count one as the predicate offense is now a "non-offense".

Therefore, the 84 month consecutive sentence in Count Two can not stand, without the "crime of violence" in Count one, so this then brings into question the 300 month sentence in Count Five.

Due to the fact that pursuant to the law of the land doctrine, Petitioner is actually and factually innocent of Counts one and Two, for the reasons set forth herein, and the fact that 18 USC 924(c) requires a previous conviction to reach the 300 month additional 18 USC 924(c) threshold,

Petitioner contends that he did plead guilty to Count Five, and now since it is a "stand alone" count of an 18 USC 924 (c) violation, Petitioner request to be sentenced to the initial Count Two sentence of 84 months as to Count Five.

WHEREFORE, premises considered, Petitioner request an evidentiary hearing on this issue.

**GROUND FOUR:** \_\_\_\_\_

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(a) Supporting facts (*Be brief. Do not cite cases or law.*):

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(b) Did you present Ground Four in all appeals that were available to you?

Yes       No

14. If there are any grounds that you did not present in all appeals that were available to you, explain why you did not: N/A
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**Request for Relief**

15. State exactly what you want the court to do: Petitioner request an evidentiary hearing, on this issue. Vacate Petitioner's immediate sentence and order Petitioner's release, or any other relief to which Petitioner may be entitled.
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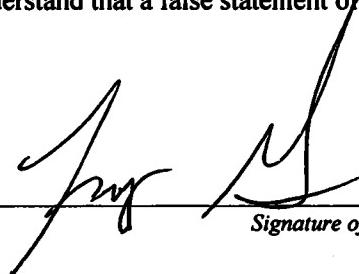
**Declaration Under Penalty Of Perjury**

If you are incarcerated, on what date did you place this petition in the prison mail system:

7/4/2018

I declare under penalty of perjury that I am the petitioner, I have read this petition or had it read to me, and the information in this petition is true and correct. I understand that a false statement of a material fact may serve as the basis for prosecution for perjury.

Date: 7/2/2018

  
*J.W.F.*  
\_\_\_\_\_  
*Signature of Petitioner*

\_\_\_\_\_  
*Signature of Attorney or other authorized person, if any*